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Third report on diplomatic protection

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Addendum

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D. The Calvo Clause

Article 16

1. A contractual stipulation between an alien and the State in which he carries on business to the effect that:

(a) the alien will be satisfied with local remedies; or

(b) no dispute arising out of the contract will be settled by means of an international claim; or

(c) the alien will be treated as a national of the contracting State for the purposes of the contract,

shall be construed under international law as a valid waiver of the right of the alien to request diplomatic protection in respect of matters pertaining to the contract. Such a contractual stipulation shall not, however, affect the right of the State of nationality of the alien to exercise diplomatic protection on behalf of such a person when he or she is injured by an internationally wrongful act attributable to the contracting State or when the injury to the alien is of direct concern to the State of nationality of the alien.

2. A contractual stipulation referred to in paragraph 1 shall be construed as a presumption in favour of the need to exhaust local remedies before recourse to international judicial settlement.

1. Introduction

1. The "Calvo Clause" is a contractual undertaking by an alien in which he agrees to waive any right which he may have to diplomatic protection by his State of nationality in matters arising out of the contract and to confine himself exclusively to local judicial remedies for any grievances he may have relating to the contract.[1] Named after a distinguished Argentine jurist, Carlos Calvo (1824-1906), the clause has featured prominently in legal discourse on the local remedies rule and as late as 1955 was described as "one of the most controversial questions of contemporary international diplomacy and jurisprudence".[2] Although it has largely disappeared from the limelight today, no codification of the local remedies rule would be complete without recognition of this Clause. Moreover, to ignore it would be to overlook a component of the local remedies rule that has been hailed as a regional custom in Latin America,[3] forming part of the national identity of many States.[4]

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[1] A. V. Freeman, "Recent Aspects of the Calvo Doctrine and the Challenge to International Law", (1946) 40 *A.J.I.L.* 121, at p. 130. See also F. V. García-Amador, "Calvo Doctrine, Calvo Clause", in 1 *Encyclopedia of Public International Law* (1992), 521, at p. 522; G. Schwarzenberger, *International Law*, vol. 1 (International Courts), 3rd ed. (1957), p. 150; D. R. Shea, *The Calvo Clause: A Problem of International Law and Diplomacy* (1955), p. 6.

[2] Shea, *supra* note 1, p. 6.

[3] Ibid., pp. 260-279.

[4] F. Oschmann, *Calvo-Doktrin und Calvo Klauseln* (1993), p. 381.

2. History

2. Revolutions, civil wars and internal disturbances were a common feature of Latin American history in the late nineteenth century and early twentieth century. Nationals of European States and the United States of America caught up in these civil disruptions often suffered injury to person and property. When the host State denied responsibility for such injuries, aliens frequently sought the protection of their State of nationality and requested it to claim compensation on their behalf in international proceedings. Inevitably aliens abused their privileged position. As Shea states in *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (1955):

> "Nationals often felt entitled to complete security of their persons and property, and appealed to their governments on rather flimsy evidence and without any real effort to obtain local redress. The petitioned government, acting on limited, one-sided evidence, and often under domestic political pressure, sponsored claims that frequently were not based upon strict justice. Utilization of armed force to compel the weaker nations to honor these dubious claims was not infrequent, and it sometimes happened that the severity of the measures adopted in seeking compensation for the alleged injuries was far out of proportion to the extent of the initial damages suffered".[5]

Mixed claims commissions established to settle these disputes appeared to Latin American States to be biased in favour of the protecting State.

3. As a consequence Latin American States sought to undermine the institution of diplomatic protection by advancing theories that challenged its very foundation. First, the Drago Doctrine, codified in the Porter Convention of 1907, declared forcible intervention to collect public debts to be illegal; a doctrine inspired mainly by the German, British and Italian intervention in Venezuela in 1902-1903. Secondly, the Calvo Doctrine sought to outlaw all forms of diplomatic protection by the invocation of two principles: the sovereign equality of States, which prohibited foreign intervention, and the equality of nationals and aliens, which deprived aliens of their claim to privileged treatment.[6] On this latter principle, Calvo declared:

> "It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended ...
>
> "The responsibility of Governments toward foreigners cannot be greater than that which these Governments have towards their own citizens."[7]

4. Attempts to implement the Calvo Doctrine by treaty and constitutional or legislative provisions were largely unsuccessful.[8] It was the Calvo Clause, a clause inserted in a contract between an alien and the host State in which the alien agreed to forego his right to request diplomatic protection in any dispute arising out of the contract, that ensured some measure of success for the Calvo Doctrine. It is in this form that the Calvo Doctrine is today remembered.

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[5] Op. cit., p. 12.

[6] See A. S. Hersley, "The Calvo and Drago Doctrines" (1907) 1 *A.J.I.L.* 26.

[7] *Le Droit International: Théorétique et Pratique*, 5e éd. (Paris 1896), vol. VI, p. 231; see also vol. III, p. 138. Translation by Shea, *supra* note 1, pp. 18-19.

[8] Shea, *supra* note 1, pp. 21-27.

3. Scope

5. That the Calvo Clause may take several forms is evidenced by the diverging formulations presented by writers.[9] The clearest exposition is that given by García Amador:

> "Sometimes, it merely consists of a stipulation that the foreign individual concerned will be satisfied with the action of the local courts. In other cases, the Clause embodies a more direct and broader waiver of diplomatic protection, as when it provides that disputes which may arise shall in no circumstances lead to an international claim, or else that the foreign individuals or corporate bodies are to be deemed to be nationals of the country for the purposes of the contract or concession."[10]

6. The Calvo Clause relates to the contractual relationship between alien and host State and only operates in respect of disputes concerning the interpretation, application or performance of the contract.[11] It does not extend the waiver to a denial of justice that may occur in proceedings relating to the contract before a municipal court.[12]

4. Codification in the Americas

7. Attempts to codify the Calvo Clause among Latin American States have been largely successful.

8. In 1902, the Second International Conference of American States held in Mexico City adopted the Convention relative to the Rights of Aliens, which, after recognizing the equality of nationals and aliens (with no special privileges for the latter), provided that:

> "Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a State, or its citizens, he shall present his claims to a competent Court of the country, and such claims shall not be made, through diplomatic channels, except in the cases where there shall have been, on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of international law."[13]

The United States was present at the Conference but abstained from voting on the Convention.

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[9] See D. P. O'Connell, *International Law*, 2nd ed. (1970), vol. II, pp. 1059-1060; C. Eagleton, *The Responsibility of States in International Law* (1928), p. 168; W. K. Geck, "Diplomatic Protection", 1 *EPIL* 1045 (1992), p. 1058; F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (1932), p. 169; K. Lipstein, "The Place of the Calvo Clause in International Law", 22 *BYIL* 130 (1945) 131-134.

[10] F. V. García-Amador, "State Responsibility. Some New Problems" (1958-II) 94 *Recueil des Cours* 369, 455-456 (hereinafter "State Responsibility"); F. V. García-Amador, International responsibility, Third report, *Yearbook* ... 1958, vol. II, p. 47, at p. 58, document A/CN.4/111 (hereinafter Third Report).

[11] Ibid., "State Responsibility", 456.

[12] This subject is dealt with more fully in para. 31 (d) below. The views of García Amador cited at footnote 61 seem to contradict this proposition.

[13] The text of this Convention appears in annex 5 to the first report on State responsibility submitted by F. V. García Amador to the Commission: on 20 January 1956, *Yearbook* ... 1956, vol. II, p. 173, at p. 236 (document A/CN.4/96). See further on this Convention, and subsequent attempts to confirm it, Shea, *supra* note 1, at pp. 77-79.

9. In 1933, the Seventh International Conference of American States was held in Montevideo. At the outset it adopted a resolution, supported by the United States, which:

> "Reaffirms equally that diplomatic protection cannot be initiated in favour of foreigners unless they exhaust all legal measures established by the laws of the country before which the action is begun. There are excepted those cases of manifest denial or unreasonable delay of justice which shall always be interpreted restrictively, that is, in favour of the sovereignty of the State in which the difference may have arisen. Should no agreement on said difference be reached through diplomatic channels, within a reasonable period of time, the matter shall then be referred to arbitration."[14]

10. The Conference proceeded to adopt the Convention on Rights and Duties of States, which, in article 9, provided that:

> "Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of nationals."[15]

11. Although the United States became a party to the Convention, it reserved its rights under international law, which raised doubts about its acceptance of this provision as it did not accord with the United States understanding of the rights of aliens under international law.[16]

12. At the Ninth International Conference of American States in Bogotá in 1948, the following provision was adopted as article VII of the Pact of Bogotá:

> "The High contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective state."[17]

13. Although the United States ratified the treaty, it added the following reservation:

> "The Government of the United States cannot accept article VII relating to diplomatic protection and the exhaustion of remedies. For its part, the Government of the United States maintains the rules of diplomatic protection, including the rule of exhaustion of local remedies by aliens, as provided by international law."[18]

5. Codification: the international perspective

14. Attempts to codify the Calvo Clause at the international level have proved less successful.

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[14] See García Amador, *supra* note 13.
[15] 165 L.N.T.S. 19.
[16] See Shea, *supra* note 1, pp. 81-83.
[17] American Treaty on Pacific Settlement (Washington, D.C., 1948). Shea, ibid., p. 102.
[18] Ibid., p. 103.

15. The 1930 Conference for the Codification of International Law at The Hague was briefed with the 1926 Guerrero Report,[19] the 1929 Harvard Law School Draft[20] and the 1929 Bases of Discussion drawn up by the Preparatory Committee of the Conference,[21] all of which contained proposals relating to the Calvo Clause. The Clause was not, however, considered at the Conference, largely due to disagreement over the issue of denial of justice. The Conference adjourned without agreeing on a Convention.[22]

16. In 1961, the Harvard Law School prepared another Draft Convention on the International Responsibility of States for Injuries to Aliens which provided in Article 22:

> "(4) No claim may be presented by a claimant if, *after the injury* and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled the claim.
>
> "(5) No claim under this Convention may be presented by a claimant with respect to any injury listed in subparagraph 2 (e), 2 (f), 2 (g), or 2 (h) of

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[19] Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners; see García Amador, *supra* note 13, pp. 221-222 (1926) 20 *A.J.I.L.* 176, at 182-185 (Special Supplement).

[20] Draft Convention on Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners. Article 17 of the Draft provided: "A State is not relieved of responsibility as a consequence of any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the State of which he is a national." See García Amador, *supra* note 13, pp. 229-230; (1929) 23 *A.J.I.L.* 131, at pp. 202-203 (Special Supplement).

[21] García Amador, *supra* note 13, pp. 223-225. The relevant bases for discussions are Nos. 26, 27, 5 and 6, which provide:

> "26. An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is and does not release the State with which the contract is made from its international responsibility. If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted; the State can then only be responsible for damage suffered by the foreigner in the cases contemplated in bases of discussion Nos. 5 and 6.
>
> "27. Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions set out in bases of discussion Nos. 5 and 6.
>
> "5. A State is responsible for damage suffered by a foreigner as the result of the fact that: (1) he is refused access to the courts to defend his rights; (2) a judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State; (3) there has been unconscionable delay on the part of the courts; (4) the substance of judicial decision has manifestly been prompted by ill-will towards foreigners as such or as subjects of a particular State.
>
> "6. A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgement vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice."

[22] E. M. Borchard, "'Responsibility of States', at the Hague Codification Conference", (1930) 24 *A.J.I.L.* 516, at 539.

article 14 [destruction of, damage to, or loss of property; deprivation of use or enjoyment of property; deprivation of means of livelihood; and loss or deprivation of enjoyment of rights under a contract or concession]:

(a) if prior to his acquisition of property rights or of a right to exercise a profession or occupation in the territory of the State responsible for the injury, or as a condition of obtaining rights under a contract with or a concession granted by that State, the alien to whom such rights were accorded agreed to waive such claims as might arise out of a violation by the respondent State of any of the rights thus acquired,

(b) if the respondent State has not altered the agreement unilaterally through a legislative act or in any other manner, and has otherwise complied with the terms and conditions specified in the agreement; and

(c) if the injury arose out of the violation by the State of the rights thus acquired by the alien.

"(6) No claim may be presented by a claimant with respect to any of the injuries listed in paragraph 2 of article 14, if as a condition of being allowed to engage in activities involving an extremely high degree of risk, which privilege would otherwise be denied to him by the State, the alien has agreed to waive any claim with respect to such injuries and if the claim arises out of an act or omission attributable to the State which has a reasonably close relationship to such activities. *Such a waiver is effective, however, only as to injuries resulting from a negligent act or omission or from a failure to exercise due diligence to afford protection to the alien in question and not as to injuries caused by a wilful act or omission attributable to the State.*"[23]

Article 24 (1) furthermore provided:

"A State is not entitled to present a claim if the claimant or a person through whom he derives his claim has waived, compromised, or settled the claim under paragraph 4, 5, or 6 of article 22."

17. Between 1956 and 1961, the Special Rapporteur on State responsibility, Mr. García Amador, presented a number of reports to the International Law Commission which touched on the Calvo Clause. In his first report of 1956, he suggested the following basis for discussion:

"*Renunciation of diplomatic protection*, either by the State or by foreign private individuals. Renunciation of diplomatic protection by a private person constitutes an exonerating circumstance in so far as the *Calvo clause* does not refer to rights which, by their nature, are not capable of being renounced, or to questions in which the private person is not the only interested party."[24]

In 1961, in his sixth and final report, he proposed:

"(2) ... in the case of the non-performance of obligations stipulated in a contract or concession, the international claim shall not be admissible if the alien concerned has waived the diplomatic protection of the State of his

[23] Reproduced in (1961) 55 *A.J.I.L.* 548 at 578-579. Emphasis added. According to article 22 (1), the word "claimant" refers to the injured alien.

[24] Basis of discussion No. V (2) (b), *supra* note 13, p. 220. Emphasis in original.

nationality and the circumstances are in conformity with the terms of the waiver ...

(4) The waiver of diplomatic protection ... shall not deprive the State of nationality of the right to bring an international claim in the circumstances and for the purposes [of preventing the repetition of the injurious act]."[25]

6. State practice

18. Shea's comprehensive study on the Calvo Clause, published in 1955, shows that at that time the Calvo Clause was recognized in the practice, laws or constitutions of most Latin American States[26] and might be described as a Latin American regional custom.[27] State practice outside Latin America was very different. The United States has long claimed that the Clause did not and could not waive the right of the State of nationality to provide diplomatic protection and that the individual's waiver did not cover cases of denial of justice.[28] Other Governments were divided on the issue. According to their replies to a questionnaire on the subject circulated to States prior to the 1930 Hague Codification Conference, South Africa, Australia and Austria considered such clauses as having no effect. Finland, the Netherlands and Germany recognized the validity of the Clause, whereas Belgium, Denmark, Great Britain, Hungary, India, Japan, Norway, New Zealand, Poland, Switzerland and Czechoslovakia did so only as far as the rights of the individual were concerned but not in respect of the waiver of the right of the State to diplomatic interposition in cases of violations of international law. Canada, in turn, took the position that the Clause was valid if the State of nationality of the injured individual permitted the individual to enter into such contract.[29] The reply of Great Britain[30] was particularly illuminating as it gave full support to the decision in the *North American Dredging Company* case[31] (discussed below) upholding the limited validity of the Calvo Clause.

7. Judicial decisions

19. Jurisprudence on the Calvo Clause is commonly divided into two periods: those before the *North American Dredging Company* case[32] of 1926 and those afterwards.

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[25] Responsibility of the State for injuries caused in its territory to the person or property of aliens: revised draft, A/CN.4/134/Add.1, article 19; *Yearbook* ... 1961, vol. II, p. 48, document A/CN.4/134 and Addendum. See further on the history of this subject before the Commission, D. E. Graham, "The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection", 6 *Texas International Law Forum* 289, at 297-300.

[26] Ironically, perhaps, Calvo's own State, Argentina, was one of the few not to engage in this practice.

[27] *Supra* note 1, pp. 269-279.

[28] Ibid., pp. 37-45.

[29] Ibid., pp. 46-54. Bases of discussion, III (C. 75. M. 69. 1929.V): Responsibility of States for Damages Caused in their Territory to the Person or Property of Foreigners, Question X I (d), pp. 133-135.

[30] Shea, *supra* note 1, p. 50, Bases of Discussion, *supra* note 29, p. 134.

[31] *North American Dredging Company of Texas (U.S.A.) v. United Mexican States*, decision of 31 March 1926, 4 *U.N.R.I.A.A.* 26; reproduced in (1926) 20 *A.J.I.L.* 800.

[32] Ibid.

20. Decisions handed down by mixed claims commissions before 1926 were characterized by a lack of clarity and determinacy in their attitude towards the validity of the Clause. This is illustrated by the differing interpretations placed on those decisions by Borchard and Shea. While the former claimed that in the 19 cases decided only 8 recognized the validity of the Clause,[33] Shea maintains that in none of those cases was the validity of the Calvo Clause in the contract decisive.[34] Perhaps the main interest of Borchard's study is his conclusion that in cases in which the validity of the Clause was denied the decision was based on one of three grounds:

> "first, that it is beyond the competence of the individual to contract away the superior right of his Government to protect him ... secondly, in cases where the Government had annulled the contract without first appealing to the local courts, that such action relieves the claimant from the stipulation not to make the contract a subject of international claim ... thirdly, wherever possible, the courts try to find that the claim arises not out of the contract itself, but out of some violation of property rights, thus basing the claim on tort".[35]

21. The nature and scope of the Calvo Clause were authoritatively expounded by the United States-Mexican Claims Commission, presided over by President Van Vollenhoven, in 1926 in the *North American Dredging Company* case.[36] In that case the claimant company entered into a contract with the Government of Mexico for the dredging of the port of Santa Cruz. In order to secure the award of the contract the claimant agreed to the inclusion of article 18 in the contract, which read:

> "The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."[37]

22. When an alleged breach of the contract occurred, the claimant made no attempt to exhaust local remedies but instead, relying on article V in the treaty establishing the Commission which dispensed with the need to exhaust the local remedies rule, requested the Government of the United States to bring a claim on its behalf before the Commission. In upholding the motion of the Government of Mexico to dismiss the claim, the Commission embarked upon a thorough examination of the validity and scope of the Calvo Clause contained in article 18.

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[33] *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (1915), pp. 800-801.

[34] *Supra* note 1, pp. 121-193.

[35] *Supra* note 33, p. 805.

[36] *Supra* note 31.

[37] Ibid.

23. First, the Commission rejected arguments in favour of upholding or rejecting the validity of the Clause "in so far as these arguments go to extremes". It then stated:

> "The Calvo Clause in a specific contract is neither a clause which must be sustained to its full length because of its contractual nature, nor can it be discretionarily separated from the rest of the contract as if it were just an accidental postscript. The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business. The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other.
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> ...
>
> It is quite possible to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so."[38]

24. Secondly, the Commission dismissed the argument that the clause was repugnant to any recognized rule of international law and held that there was no rule of international law prohibiting all limitations on the right of diplomatic protection.[39] The Calvo Clause was permissible as it was simply an undertaking on the part of the individual not to ignore local remedies.

25. Thirdly, the Commission held that although an alien might promise to exhaust local remedies he could not

> "deprive the Government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such Government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen cannot by contract tie in this respect the hands of his Government. But while any attempt to so bind his Government is void, the Commission has not found any generally recognized rule of positive international law which would give to his Government the right to intervene to strike down a lawful contract, ... entered into by its citizen. The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself — abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction."[40]

26. With regard to the Calvo Clause in article 18 of the contract, the Commission stated that its purpose was to:

> "bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws ... But this provision did not, and could not, deprive the claimant of his American citizenship and all that that implies. It did not take from him his undoubted right to apply to his own Government for

[38] Ibid., paras. 4-5.
[39] Ibid., paras. 8-9.
[40] Ibid., para 11.

protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act."[41]

The Commission stressed that the alien

> "did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfilment, execution, or enforcement of this contract as such ... He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations ... He did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law. But he did frankly and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his Government with respect to the fulfilment and interpretation of his contract and the execution of his work thereunder."[42]

27. Finally the Commission held that article V of the treaty establishing the Commission, which provided that a claim might not be rejected on the ground that local remedies had not been exhausted, did not "entitle either Government to set aside an express valid contract between one of its citizens and the other Government." The Commission stated that article V was limited in its application to claims that had been "rightfully presented" and that that claim could not be considered to have been "rightfully presented" because the claimant had made no attempt to comply with a fundamental condition of his contract.[43]

28. In summary, the Commission held the Calvo Clause to be a promise by the alien to exhaust local remedies. He thereby waived his right to request diplomatic protection in a claim for damages arising out of the contract, or any matter relating to the contract. This did not, however, deprive him of his right to request diplomatic protection in respect of a denial of justice or other violation of international law experienced in the process of exhausting his local remedies or trying to enforce his contract.

29. The decision in the *Dredging* case has not gone unchallenged. However, most of the criticism has been directed at the refusal of the Commission to give full effect to article V of the treaty establishing the Commission[44] rather than to the

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[41] Ibid., para. 14.

[42] Ibid., para. 15.

[43] Ibid., paras. 20-21.

[44] See, for instance, E. M. Borchard, "Decisions of Claims Commissions, United States and Mexico", (1926) 10 *A.J.I.L.* 536 at 540, A. H. Feller, "Some Observations on the Calvo Clause", (1933) 27 *A.J.I.L.* 461 at 462-463; K. Lipstein, "The Place of the Calvo Clause in International Law" (1945), 22 *B.Y.I.L.* 130 at 144-145; A. V. Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 481-482; Shea, *supra* note 1, pp. 226-228. The *North American Dredging Company* case was later reheard by a domestic American-Mexican Claims Commission, composed of three American nationals, established pursuant to an Act of Congress approved 18 December 1943 (56 Stat. 1058), which passed upon claims not completed by the

formulation of the scope and effect of the Calvo Clause itself. There has been considerable effort expended on a precise formulation of the rule in the *Dredging* case. Probably the most successful such formulation is that to be found in the headnote to the case in the *Reports of International Arbitral Awards*:

> "A Calvo Clause *held* to bar claimant from presenting to his Government any claim connected with the contract in which it appeared and hence to place any such claim beyond the jurisdiction of the tribunal. The Clause will not preclude his Government from espousing, or the tribunal from considering, other claims based on the violation of international law. Article V of the *compromis held* not to prevent the foregoing result."[45]

30. Mixed claims commissions concerning Mexico handed down a number of decisions after the *Dredging* case which approved the principles expounded in that case,[46] even though in several cases the commissions displayed a remarkable leniency towards Mexico in finding that there had been no denial of justice on the facts.[47] Moreover, in *Mexican Union Railway (Great Britain) v. United Mexican States*,[48] the Commission seems to have limited the circumstances in which the Calvo Clause did not apply to one species of internationally wrongful act only: denial of justice.

8. The opinions of scholars

31. There is a wealth of writing on the Calvo Clause.[49] Since the decision in the *Dredging* case, and subsequent decisions endorsing it, it has not been possible to

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international commission or for which rehearing had been requested (Mexico making en bloc settlement and the domestic Commission adjudicating the claims). In making an award of US$ 128,627.77 in favour of the company, the domestic Commission was particularly critical of the decisions of the United States-Mexican Claims Commission on article V: "The effect of the decision of the General Claims Commission is to hold that provision 18 of the contract between the claimant and the Government of Mexico prevails despite article I and article V of the Convention. With all due deference to the learned members of said Commission, we are unable to agree with the position thus taken. In our view, article V of the Convention of September 8, 1923, is controlling as to the right of the United States Government; that pursuant thereto said Government may present this claim on behalf of the claimant, and that this Commission has jurisdiction to decide the claim." (See M. M. Whiteman, *Digest of International Law* (1967), vol. 8, p. 923). Shea rightly rejects this decision in the following terms: "Although, from the purely financial viewpoint of the claimant, this might be considered a reversal of the previous ruling on the claim, it would be erroneous to assume that this action by a purely national commission could, in any manner whatsoever, overrule or even weaken the decision or rule of the *Dredging* case in international jurisprudence. From the viewpoint of this study, the action of the domestic commission is of interest but of no determinative import to our task of determining the rule of law on the Calvo Clause." *Supra*, note 1, pp. 229-230, note 89.

[45] Vol. IV (1952), p. 26. See also Shea, *supra* note 1, pp. 215-223.

[46] *International Fisheries Co. (U.S.A.) v. United Mexican States* 4 *U.N.R.I.A.A.* 691 (1931); *Douglas G. Collie MacNeill (G.B.) v. United Mexican States*, 5 *U.N.R.I.A.A.* 135 (1931). For a discussion of these cases, see Shea, *supra* note 1, pp. 231 ff.; A. V. Freeman, *The International Responsibility of States for Denial of Justice* (1938), pp. 469-490.

[47] *Interoceanic Railway of Mexico Ltd (G.B.) v. United Mexican States*, 5 *U.N.R.I.A.A.* 178 (1931). Cf. *El Oro Mining and Railway Co (G.B.) v. United Mexican States*, 5 *U.N.R.I.A.A.* 191.

[48] 5 *U.N.R.I.A.A.* 115 (1930). Compare paras. 13 and 14 (d) and (e).

[49] See, in particular, Shea, *supra* note 1; Lipstein, *supra* note 44; Feller, *supra* note 44; Freeman, *supra* note 1; García-Amador, *supra* note 1; Oschmann, *supra* note 4; D. E Graham, "The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection" (1971) 6 *Texas International Law Forum* 289.

seriously argue that the Calvo Clause is contrary to international law. Consequently scholars have sought rather to examine its purpose and scope, largely in the context of the *Dredging* case. To say that there is no consensus on the part of writers as to the scope of the Calvo Clause is to state the obvious. A number of common principles seem, however, to emerge from the literature:

(a) The Calvo Clause is of limited validity only in the sense that it does not constitute a complete bar to diplomatic intervention. It applies only to disputes relating to the contract between alien and host State containing the Clause and not to breaches of international law. This interpretation advanced in the *Dredging* case fails to give effect to the real purpose of the Calvo Clause — to exclude diplomatic protection in all cases — and has been criticized by Latin American writers on this ground.[50] The *Dredging* case interpretation has, however, been accepted in State practice[51] and is widely supported by juristic opinion.[52]

(b) The Calvo Clause confirms the importance of the exhaustion of local remedies rule. Although some writers have suggested that the limited validity accorded to the Clause in the *Dredging* case makes it nothing more than a reaffirmation of the local remedies rule,[53] and thus a superfluous restatement of the obvious, most writers see it as going beyond such a reaffirmation. Opinions differ, however, as to what this extra dimension is.[54] The best explanation is probably to be found in the ruling in the *Dredging* case that the Calvo Clause may trump a provision in a *compromis* waiving the requirement that local remedies should be exhausted. Thus Shea states that this is "the very least" that can be accorded to the Clause. "This much effectiveness cannot be denied, for the six recent arbitral rulings can be cited in support of it. Perhaps this is the full effectiveness of the Clause ... Consequently, if future conventions conform to what would appear to be the recent trend in international arbitration [of waiving the local remedies rule in the *compromis*] then the Calvo Clause, even if restricted in effectiveness to overcoming a general waiver of the local remedies rule contained in the *compromis*, will continue to have a determinative effect on the admissibility of international claims."[55]

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[50] A. Gómez Robledo, *La Cláusula Calvo ante el derecho international* (1939), p. 176; C. Sépúlveda Gutiérrez, *La responsbilidad internacional del estado y la validez de la Cláusula Calvo* (1944), pp. 69-71; R. Beteta and E. Henriquez, "La Protección diplomática de los intereses pecuniários extranjeros y los Etados de América", (1940) 10 *Proceedings of the Eighth American Scientific Congress* 27, at pp. 44 -45.

[51] *Supra*, notes 29-30.

[52] Shea, *supra* note 1, pp. 217-218, Freeman, *supra* note 44, pp. 489-490; I Brownlie, *Principles of Public International Law*, 5th ed. (1998), pp. 548-549; R. Jennings and A. Watts, *Oppenheims International Law*, 9th ed. (1992), vol. I, p. 931.

[53] Lipstein, *supra* note 44, p. 145; Freeman, *supra* note 46, pp. 489-490; Nguyen Quoc Dinh, *Droit International Public* (P. Daillier and A. Pellet (eds.)), 6th ed. (1999), p. 778 (para. 492); A. Feller, *The Mexican Claims Commissions 1923-1934. A Study in the Law and Procedure of International Tribunals* (1935), p. 192.

[54] D. P. O'Connell has suggested, but dismissed, the argument that this "extra dimension" is that an affirmative decision on the alien's contractor's rights is a precondition for an international claim: *supra* note 9, p. 1062.

[55] *Supra* note 1, p. 260 (also pp. 215, 217, 257). This view is supported by Brownlie, *supra* note 52, p. 549. Cf. O'Connell, *supra* note 9, p. 1063; Lipstein, *supra* note 44, p. 145.

(c) International law places no bar on the right of an alien to waive by contract his own power or right to request his State of nationality to exercise diplomatic protection on his behalf.[56]

(d) An alien cannot by means of a Calvo Clause waive rights that under international law belong to his Government. The Vattelian fiction, which provides the foundation for the law of diplomatic protection, is premised on the notion that an injury to a national arising from a breach of international law is an injury to the State of nationality itself. An individual cannot waive this right as it is not in his power to do so.[57]

(e) The waiver in a Calvo Clause extends only to disputes arising out of the contract, or to breach of the contract, which does not, in any event, constitute a breach of international law.[58] It does not extend to violations of international law, and, in particular, it does not extend to a denial of justice. While there is widespread support for this proposition,[59] there is some uncertainty about denial of justice associated with or arising from the contract containing the Calvo Clause. This is apparent in the writings of García Amador. On the one hand, he acknowledges that:

> "whatever form it may take, the "Calvo Clause" invariably relates to a contractual relationship, and only operates with regard to disputes concerning the interpretation, application or performance of the contract or concession."[60]

On the other hand, in defiance of the decision in the *Dredging* case, he submits that:

> "in principle, the 'Clause' is valid as a bar to the exercise of diplomatic protection even in cases of 'denial of justice'. It is not to be overlooked that it operates only with regard to disputes concerning the interpretation, application of performance of contracts or concessions. In this sense, *only a specific case of denial of justice would be involved, not all the cases where some other rights of the alien or interests of another kind could be affected*. At first sight, this exception to the principle which governs international responsibility for acts and omissions of this nature might appear unjustified. In reality, however, it is not unjustified. Contractual interests and rights are not, so to speak, in the same class as the other rights enjoyed by the alien in international law. Not only are they of an exclusively monetary character, but the alien acquires them by virtue of a contract or concession, the acceptance of which depends solely on his own volition. With this reasoning one does not seek to minimize the importance of this category of rights and interests, but to stress that, by their very nature, they can form the subject of an infinite variety of operations and transactions which can be effected merely by the consent of the contracting parties. In brief, these are rights and interests in respect of which the alien may waive diplomatic protection in whatever terms he considers most conducive to

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[56] E. Jimenéz de Aréchaga, "International Responsibility", in M. Sørensen (ed.). *Manual of Public International Law* (1968), p. 531 at p. 591; García Amador, "State Responsibility", *supra* note 10, at pp. 459-460; P. C. Jessup, *A Modern Law of Nations*, reprint (1968), pp. 11, 117; Shea, *supra* note 1, pp. 261-263.

[57] Eagleton, *supra* note 9, p. 170; Borchard, *supra* note 33, p. 809; García Amador, *supra* note 10, p. 460; Nguyen Quoc Dinh, *supra* note 53, p. 778.

[58] Brownlie, *supra* note 52, p. 549.

[59] Jimenéz de Aréchaga, *supra* note 56, pp. 591-592, Freeman, *supra* note 44, pp. 489-490; O'Connell, *supra* note 9, p. 1064; Shea, *supra* note 1, pp. 217-218.

[60] "State Responsibility", *supra* note 10, p. 456.

the acquisition of the benefits which he expects to derive from the contract or concession."[61]

Support for this view, he argues, is to be found in the *Interoceanic Railway* case.[62] At least, he submits, drawing on the opinion of Shea,[63] the Calvo Clause requires proof of an aggravated form of denial of justice ("more patent or flagrant")[64] before an international claim may be brought.[65]

9. Recent developments

32. The Calvo Clause was born out of the fear on the part of Latin American States of intervention in their domestic affairs by European States and the United States of America under the guise of diplomatic protection. Resistance to the Calvo Clause, on the other hand, stemmed from the fear on the part of European States and the United States of America that their nationals would not receive fair treatment in countries whose judicial standards fell below the international minimum standard created by the latter States in their own image. Today the situation has changed. European States and the United States of America respect the sovereign equality of Latin American States and have confidence in their judicial systems, which, as in Europe, are subject to both regional and international monitoring.[66] Consequently the aggressive assertions of diplomatic protection that once characterized relations between Europe and the United States, on the one hand, and Latin America, on the other, have come to an end. This does not mean that the debate over the Calvo Clause has lost its relevance. While international legal opinion in Europe and the United States likes to see the Calvo Clause as a relic of a past era of inequality in international relations,[67] Latin American States still cling to the Clause as an important feature of their regional approach to international law. While they have demonstrated some flexibility in their attitude to new institutions creating dispute settlement procedures for foreign investors, there is no doubt that many of these institutions are still judged by their adherence to the Calvo Clause. Moreover, key resolutions of the General Assembly on international economic law show the strong influence of Calvo.

33. The Charter of Economic Rights and Duties of States, contained in General Assembly resolution 3281 (XXIX) of 12 December 1974, proclaims that disputes over compensation arising from the expropriation of foreign property "shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be

[61] Ibid., p. 458. Emphasis added.

[62] *Supra* note 47

[63] *Supra* note 1, p. 265.

[64] Ibid.

[65] *Supra* note 10, p. 459.

[66] By bodies established under the American Convention on Human Rights and the International Covenant on Civil and Political Rights.

[67] According to Rudolf Dolzer, "International practice confirming the Calvo doctrine is nowhere visible, and the legal opinions of the Western capital-exporting nations definitely refute the argument that all major groups affected have consented to a change in customary law over the Calvo Doctrine", "New Foundation of the Law of Expropriation of Alien Property" (1981) 75 *A.J.I.L.* 551, at p. 571. That the Calvo Clause has not been repudiated by legal opinion in the United States is illustrated by *Reavis v. Exxon Corporation*, United States, New York Supreme Court, Special Term, New York County (Gellinoff J.), decision of 28 July 1977, reported in 66 ILR 317 (1984), in which the Court seriously considered, but did not apply the Calvo Clause.

sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."[68] The moderate precursor of that resolution, the resolution on "Permanent sovereignty over natural resources" of 14 December 1962, likewise declares that in the case of a dispute over compensation for expropriated property "the national jurisdiction of the State taking such measures shall be exhausted."[69] William D. Rogers has rightly described these resolutions as a "classic restatement of Calvo"![70]

34. The Andean Pact, establishing a common market between Bolivia, Colombia, Ecuador, Peru and Venezuela, likewise shows respect for the Calvo Clause. Decision 24 provides that:

> "In no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient country or allow the subrogation by States to the rights and actions of their national investors." (art. 51)[71]

Decision 220, in turn, lays down the rule that:

> "For the settlement of disputes or conflicts deriving from direct foreign investments or from the transfer of foreign technology, Member Countries shall apply the provisions established in their local legislation."(art. 34)[72]

35. In 1991, the Andean Pact countries revised and liberalized their foreign investment code in decision 291, but left this element of the Calvo Clause unchanged.[73]

36. The response of Latin American States towards the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, establishing the International Centre for Settlement of Investment Disputes (ICSID),[74] was initially lukewarm.[75] However, article 27 incorporates an element of the Calvo Clause by providing that:

> "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have

[68] Chap. II, article 2, para. 2 (c).

[69] General Assembly resolution 1803 (XVII), para. 4.

[70] "Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas" (1978) 72 *A.J.I.L.* 5.

[71] Decision No. 24 on Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses and Royalties, 30 November 1976. Reproduced in (1976) 16 ILM 138, at p. 153.

[72] Commission Decision No. 220 on the Andean Code on the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties, 11 May 1987. Reproduced in (1987) 27 ILM 974, at p. 986.

[73] Commission Decision No. 291 on the Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties, 21 March 1991. Reproduced in (1983) 30 ILM 1283, at p. 1291 (art. 10).

[74] 575 U.N.T.S. 159, at p. 176; (1996) 4 ILM p. 524.

[75] Rogers, *supra* note 70, pp. 3-4; D. Manning-Cabrol, "The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors" (1994-1995) 26 *Law and Policy in International Business*, 1169, at p. 1185. Today most Latin American States are parties to ICSID.

submitted to arbitration under this Convention, unless such other Contracting Party shall have failed to abide by and comply with the award rendered in such dispute."

37. Latin American States initially responded in a similar fashion to the Multilateral Investment Guarantee Agency (MIGA),[76] which facilitates investment in developing countries by making political risk insurance available to investors wishing to do business in developing countries. But again, as with ICSID, MIGA does not necessarily run counter to the philosophy of the Calvo Clause, as it permits arbitration only in cases in which the dispute cannot be resolved through negotiation or conciliation.[77] Today most Latin American States are parties to MIGA.

38. The North American Free Trade Agreement[78] (NAFTA) of 1992 between the United States, Canada and Mexico has been hailed as evidence of a new flexibility on the part of the major Latin American proponent of the Calvo Clause,[79] as it permits a foreign investor in certain circumstances to resort to international arbitration.[80] This view[81] should not, however, be exaggerated as there are powerful voices within Mexico demanding that NAFTA be implemented in a manner compatible with the Calvo Clause.[82]

10. Conclusion

39. There are two options open to the Commission. The first is to decline to draft any provision on this subject on the ground that a Calvo Clause is relevant and valid only insofar as it reaffirms the exhaustion of local remedies rule. To include such a provision would therefore be both unnecessary and superfluous. The second option is to draft a provision which limits the validity of the Calvo Clause to disputes arising out of the contract containing the clause and which recognizes that such a clause may give rise to a rebuttable presumption in favour of the exhaustion of local remedies even where the *compromis* referring disputes between the State of

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[76] (1985) 25 ILM, p. 1598.

[77] D. Manning-Cabrol, *supra* note 72, pp. 1185-1186; C. K. Dalrymple, "Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause" (1996) 29 *Cornell International Law Journal* 161.

[78] (1993) 32 ILM 289, 605.

[79] Article 27 of the Mexican Constitution provides: "Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mines or of waters. The State may grant the same right to foreigners, provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their Governments in matters relating thereto; under penalty, in case of non-compliance with this agreement, of forfeiture of the property acquired to the Nation." Shea states that Mexico "has been the most outspoken of Latin American States in its advocacy of the justice and legality of the Calvo Clause" because it "has perhaps suffered more from the abuses of intervention and diplomatic protection than any other of the Latin American Nations" (*supra* note 1, p. 279).

[80] *Supra* note 78, chaps. 11 and 20.

[81] J. Daly, "Has Mexico Crossed the Border of State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico and the NAFTA" (1994) 25 *St. Mary's Law Journal* 1147.

[82] B. Sepúlveda Amor, "International Law and National Sovereignty: the NAFTA and the Claims of Mexican Jurisdiction" (1997) 19 *Houston Journal of International Law* 565. Cf. S. Zamora, "Allocating Legislative Competence in the Americas: the Early Experience under NAFTA and the Challenge of Hemispheric Integration", ibid., p. 615.

nationality of the injured alien and the host State to judicial settlement contains a clause excluding the need to exhaust local remedies. Such a provision would reflect jurisprudence, doctrine and, possibly, State practice on the Calvo Clause.

40. While the Special Rapporteur accepts that there may be some merit in the first proposal, he prefers the latter, as it would codify a customary rule of one of the major regions of the world and provide clarity on the limits of a mechanism that has featured prominently in the history of this branch of the law. It is in this spirit that article 16 is laid before the Commission.